UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF GRANTED: March 8, 2011

CBCA 337, 338, 339, 978

THE BOEING COMPANY, SUCCESSOR-IN-INTEREST
OF ROCKWELL INTERNATIONAL CORPORATION,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Richard J. Ney and S. Jean Kim of Chadbourne & Parke LLP, Los Angeles, CA, counsel for Appellant.

Brady L. Jones, III, and Kaniah W. Konkoly-Thege, Office of Legal Services, Department of Energy, Cincinnati, OH, counsel for Respondent.

Before Board Judges **GILMORE**, **BORWICK**, and **McCANN**.

McCANN, Board Judge.

The Boeing Company (Boeing), successor-in-interest to Rockwell International Corporation (Rockwell), has moved for summary relief on what it calls its "Government Claim." The Government Claim asserts that Boeing is entitled to recover Rockwell's costs of defending itself in the matter of *United States ex rel. Stone v. Rockwell International Corp*., No. 89-C-1154 (D. Colo. 1989) (*Stone*), from the time the action was filed in July 1989, to the date the Government filed its motion for leave to intervene on November 14, 1995. Boeing contends that these costs were incurred by Rockwell in defense of claims for

which it was not found liable. We have already decided that Boeing was entitled to recover Rockwell's defense costs incurred solely in defense of claims for which it was not found liable. See *Boeing Co. v. Department of Energy*, 09-1 BCA ¶ 34,026 (2008). The question before us is whether the defense costs incurred by Rockwell prior to the filing of the motion to intervene were incurred in defense of claims for which the company was not found liable.

Uncontested Facts

From November 1980 through March 1986, Mr. James Stone worked as an engineer at the Rocky Flats nuclear weapons plant in Colorado. *Rockwell International Corp. v. United States*, 549 U.S. 457, 460 (2007) (*Rockwell International*). This plant was operated by Rockwell under a Management and Operating contract with the Department of Energy (DOE). *Id.* In the early 1980's, Rockwell explored the concept of mixing the toxic pond sludge that was accumulating in the solar evaporation ponds with cement. The idea was to pour the sludge and concrete mixture into boxes, where it would solidify into "pondcrete" blocks that could be safely stored for disposal. *Id*. at 460-61.

In 1982, Stone reviewed the proposed process for creating pondcrete and concluded that the process was defective. He communicated this conclusion to Rockwell management in a written "Engineering Order." Mr. Stone believed that the piping system that was to be used would not properly remove the sludge and the resulting mixture of sludge and cement would therefore be inadequate. He believed that this inadequate mixture would disintegrate and create additional contamination problems. 549 U.S. at 461. Rockwell, nevertheless, produced pondcrete blocks which turned out to be "concrete hard" up to the time Stone left Rockwell. Only after his departure in March 1986 were "insolid" blocks of pondcrete discovered. *Id*.

In June 1987, more than a year after Stone left Rockwell, he went to the Federal Bureau of Investigation (FBI), alleging various environmental crimes at the Rocky Flats plant during the time of his employment. Mr. Stone provided 2300 pages of documents to the FBI. Included within these pages was his 1982 "Engineering Order" questioning whether the pondcrete plan would work. He did not discuss his reservations about pondcrete with the FBI. 549 U.S. at 461-62.

In July 1989, Stone brought a *qui tam* action, *Stone*, in the United States District Court for the District of Colorado. In his complaint, Stone alleged that during the 1980s Rockwell violated certain federal and state environmental laws and regulations. 549 U.S. at 463. As required by the False Claims Act (FCA), 31 U.S.C. § 3730(b)(2) (2006), Stone delivered to the Government a confidential disclosure statement describing "substantially all material evidence and information" in his possession. 549 U.S. at 463. The statement identified

twenty-six environmental and safety issues. Only one of these issues involved pondcrete. In his statement, Stone indicated that he had reviewed the system design for the pondcrete and believed that the piping would not properly remove the sludge, which, in turn, would cause an inadequate mixture of cement and sludge. *Id*. at 464.

Initially, the Government declined to intervene in *Stone*. However, on November 14, 1995, it reversed itself and sought leave to intervene from the District Court. A year later, in November 1996, the District Court granted the Government's request. A few weeks later the Government and Stone filed a joint amended complaint. 549 U.S. at 464-65. The amended complaint alleged that Rockwell had violated the Resource Conservation Recovery Act (RCRA), 42 U.S.C. § 6928 and 18 U.S.C. § 1001, by storing leaky pondcrete blocks, but did not allege that any defect in the piping system caused the pondcrete to become insolid. *Id*. at 465. The amended complaint alleged claims for violation of the FCA (count 1), common law fraud (count 2), breach of contract (count 3), payment by mistake (count 4), unjust enrichment (count 5), and a sixth count for alleged FCA violations that were asserted by Stone, alone. In a statement of claims which became a part of the pretrial order and which superseded their earlier pleadings, the Government and Stone stated that the pondcrete's insolidity was due, among other things, to an incorrect cement/sludge ratio. *Id*.

In 1999, the case went to trial, and neither the Government nor Stone alleged that the piping system was the cause of the insolid pondcrete. In fact, both Stone's and Rockwell's counsel contended that the pondcrete failed because Rockwell's foreman who was hired in the winter of 1986 used an insufficient ratio of cement to sludge in an effort to increase production. 549 U.S. at 465-66. The result of the trial was that Rockwell prevailed completely on counts 2 through 5, and also on seven of the ten claims in count 1. (Count 6 had been separated.) With respect to the FCA allegations, the jury found against Rockwell on three of the ten claims in count 1, for three periods involving pondcrete allegations (April 1 to September 30, 1987; October 1, 1987, to March 31, 1988; and April 1 to September 30, 1988.). The jury awarded compensatory damages of $1,390,775.80 on the three claims where Rockwell was found liable. *Id*. at 466. The Government had sought approximately $187 million in damages.

After the verdict, Rockwell filed a motion to dismiss Stone's claims, claiming that Stone was not an original source as is required by the FCA. The District Court initially ruled that Stone qualified as an original source for purposes of FCA jurisdiction. However, on remand from the Court of Appeals for the Tenth Circuit, the District Court found that Stone had produced the 1982 engineering order, but that the order was not sufficient to communicate Stone's allegations, as required. The Tenth Circuit disagreed, concluding that the 1982 order sufficed. 549 U.S. at 466. On appeal, the Supreme Court reversed and held that Stone was not an original source. *Id*. at 476.

In its decision, the Supreme Court found that the Government and Stone abandoned Stone's claim for defective pondcrete caused by a bad piping system and replaced it with a claim that a new Rockwell foreman had used an insufficient cement-to-sludge ratio that caused the pondcrete to leak:

> [T]he amended complaint alleged that Rockwell violated RCRA by storing leaky pondcrete blocks, but did not allege that any defect in the piping system (as predicted by Stone) caused insolid pondcrete. Respondents clarified their allegations even further in a statement of claims which became part of the final pretrial order and which superseded their earlier pleadings. This said that the pondcrete's insolidity was due to "an incorrect cement/sludge ratio used in pondcrete operations, as well as due to inadequate process controls and inadequate inspection procedures." It continued:
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> > "During the winter of 1986, Rockwell replaced its then pondcrete foreman, Norman Fryback, with Ron Teel. Teel increased pondcrete production rates in part by, among other things, reducing the amount of cement added to the blocks. Following the May 23, 1988 spill, Rockwell acknowledged that this reduced cement-to-sludge ratio was a major contributor to the existence of insufficiently solid pondcrete blocks on the storage pads."
>
> The statement of claims again did not mention the piping problem asserted by Stone years earlier.

549 U.S. at 465 (footnote and citations omitted). In coming to its conclusion, the Supreme Court found that, at the time Stone filed his qui tam complaint, Stone did not possess the information that became the basis of the claims in count 1 of the amended complaint for which Rockwell was ultimately found liable.

> The only false claims ultimately found by the jury . . . involved false statements with respect to environmental, safety, and health compliance over a 1 ½ year period between April 1, 1987 and September 30, 1988. As described by Stone and the Government in the final pretrial order, the only pertinent problem with respect to this period of time for which Stone claimed to have direct and independent knowledge was insolid pondcrete. Because Stone was no longer employed by Rockwell at the time, he did not know that the pondcrete was insolid; he did not know that pondcrete storage was even subject to RCRA; he did not know that Rockwell would fail to remedy the

> defect; he did not know that the insolid pondcrete leaked while being stored onsite; and, of course, he did not know that Rockwell made false statements to the Government regarding pondcrete storage.

Id. at 475.

Discussion

Summary relief is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247 (1986). "Only disputes over facts that might affect the outcome of the case under governing law will properly preclude the entry of summary judgment." *Id*. at 248. Any doubt on whether summary relief is appropriate is to be resolved against the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In *Boeing Co.*, 09-1 BCA at 168,314, this Board found that under clause (e)(32) of the contract, Rockwell was entitled to recover its defense costs incurred solely in defense of claims other than those claims for which it was found liable. In its motion, Boeing claims that all defense costs incurred prior to the filing of the amended complaint were incurred in defense of claims other than claims for which Rockwell was found liable. Boeing is correct.

As the above facts establish, the claims where Rockwell was found liable were not even asserted until the amended complaint was filed. The three claims in count 1 for which Rockwell was found liable, relating to the time period between April 1, 1987, and September 30, 1988, all had to do with pondcrete insolidity. This insolidity was caused by an improper cement-to-sludge ratio. It was not caused by a bad piping mechanism, as alleged by Stone in his 1982 "Engineering Order." The pondcrete initially was "concrete hard." It was not until after Stone left the employ of Rockwell that the cement-to-sludge ratio was changed, causing the insolid pondcrete. As the Supreme Court said, Stone could not have known about the insolid pondcrete or the reasons for its insolidity.

It is mere coincidence that Stone predicted pondcrete insolidity in his report for one reason, and the insolidity occurred long after for a completely different reason. Stone knew nothing of the decision to change the cement-to-sludge. He did not even know of the existence of the pondcrete insolidity. At most, all he did was make an incorrect prediction (of pondcrete problems) based upon his incorrect belief that the piping system was inadequate. Such happenstance is not sufficient for us to conclude that defense costs regarding pondcrete insolidity incurred prior to the filing of the motion for leave to intervene and those incurred after the filing are the same, or even related. Such costs are entirely different.

The pondcrete defect issue that actually existed was not included in the original complaint. Thus, the defense costs relating to pondcrete incurred prior to the filing of the motion to intervene, if any, are not related to the issues in count 1 of the amended complaint upon which Rockwell was found liable. The same is true for all other defense costs incurred prior the filing of the motion to intervene. Consequently, all defense costs incurred prior to the filing of the motion to intervene are recoverable as allowable costs under the contract.

The Government argues that the issue of the separateness between defense costs, if any, incurred in relation to pondcrete insolidity prior the filing of the motion to intervene and those incurred after has not been finally established, for purposes of this case, by the Supreme Court's decision in *Rockwell International*. The Government contends that the facts set forth above which are taken from the Supreme Court's decision should not be accorded collateral estoppel effect. We disagree.

In its decision in *Rockwell International*, the Supreme Court decided that the pondcrete issue contained in the original complaint was completely distinct from the pondcrete issue contained in those claims in count 1 of the amended complaint for which Rockwell was found liable. This is the exact same issue that must be decided by this Board in order to decide this motion. Since the Supreme Court has already decided this issue in a fully litigated case between the parties, this Board is bound by the doctrine of issue preclusion or "collateral estoppel" to adopt the Supreme Court's conclusion on this point.

> Under the doctrine of issue preclusion, traditionally called "collateral estoppel," issues which are actually and necessarily determined by a court of competent jurisdiction are conclusive in a subsequent suit involving the parties to the prior litigation. *Restatement (Second) of Judgments* § 27 (1980). The underlying rationale is that a party who has litigated an issue and lost should be bound by that decision and cannot demand that the issue be decided over again. *Warthen v. United States*, 157 Ct. Cl. 798, 800 (1962); 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.443[1] (2d ed. 1983).

Mother's Restaurant, Inc. v. Mama's Pizza, Inc., 723 F.2d 1566 1569-70 (Fed. Cir. 1983) (footnote omitted). In order to prevail the moving party must establish --

> [a]ll the essential requirements for the application of issue preclusion . . .: (1) the issues to be concluded are identical to those involved in the prior action; (2) in that action the issues were raised and "actually litigated"; (3) the determination of those issues in the prior action was necessary and essential to the resulting judgment; and (4) the party precluded . . . was fully represented in the prior action.

Id. In this case all of these requirements have been met. The issues supporting the original source determination are identical to the issues supporting the separateness of the claims. These issues were raised and fully litigated. The determination of those issues was necessary and essential to the decision and the party being precluded, DOE, was fully represented.

DOE set forth arguments as to why issue preclusion should not apply in this case. It argues that the Supreme Court is a "court of review and not of first view," that the case is not ripe, the issues are not the same, and the issues were not raised and actually litigated. None of these arguments are meritorious. DOE also argues that all defense costs, including the defense costs incurred prior to the filing of the motion to intervene, are unallowable under the Defense of Fraud Proceedings Clause, clause (e)(32). We have previously ruled that this argument lacks merit. *Boeing Co.*, 09-1 BCA at 168,314.

Decision

Appellant's motion for summary relief is **GRANTED**. Appellant is entitled to recover *Stone* defense costs incurred from July 19, 1989, to November 14, 1995.

R. ANTHONY McCANN
Board Judge

We concur:

BERYL S. GILMORE
Board Judge

ANTHONY S. BORWICK
Board Judge